

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FRANCES JIANG, GOPAL KUMAR, APARAJITA MISRA, and
GANAPATHY SUNDARAM

Appeal 2007-0036
Application 10/699,452
Technology Center 2600

Decided: May 1, 2007

Before: HOWARD B. BLANKENSHIP, JAY P. LUCAS, and MARC S. HOFF, *Administrative Patent Judges.*

HOFF, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 (2002) from a final rejection of claims 1-17. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

Appellants' invention relates to a method of indicating to a wireless data communication service subscriber the time delay associated with gaining access to the wireless network.

An understanding of the invention can be derived from a reading of exemplary independent claim 1, which is reproduced below:

1. A method of communication comprising:
in response to a request for service, transmitting at least one message comprising existing delay information corresponding with an estimated delay length associated with accessing the service through an open loop network.

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Ament	US 2004/0105436 A1	Jun. 3, 2004
Buford	US 5,945,948	Aug. 31, 1999
Bender	US 6,366,779 B1	Apr. 2, 2002

The rejections as presented by the Examiner are as follows:

1. Claims 1, 2, 5-11, and 14-17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ament and Bender.
2. Claims 3, 4, 12, and 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Ament, Bender, and Buford.

Appellants contend that the claimed subject matter would not have been obvious. The Examiner contends that each of the two groups is properly rejected.

Rather than repeat the arguments of Appellants or the Examiner, we make reference to the Briefs and the Answer for their respective details. Only those arguments actually made by Appellants have been considered in this decision. Arguments that Appellants could have made but chose not to

make in the Briefs have not been considered and are deemed to be waived.
See 37 C.F.R. § 41.37(c)(1)(vii) (2004).¹

We affirm.

ISSUES

Have Appellants shown that the Examiner has failed to establish a prima facie case of obviousness, because no reference of record teaches transmitting delay information “corresponding with an estimated delay length” as required by independent claims 1 and 10?

Have Appellants shown that the Examiner has failed to establish a prima facie case of obviousness, because no reference of record teaches that the estimated delay length comprises at least one time interval between a first instant corresponding with a received autonomous service request generated at a predefined moment in time and a second instant corresponding with granting service access, as required by dependent claims 3 and 12?

Have Appellants shown that the Examiner has failed to establish a prima facie case of obviousness, because no reference of record teaches that the predefined moment in time comprises at least one of a periodic and an aperiodic instant, as required by dependent claims 4 and 13?

¹ Appellants have not presented any substantive arguments directed separately to the patentability of the dependent claims or related claims in each group, except as will be noted in this opinion. In the absence of a separate argument with respect to those claims, they stand or fall with the representative independent claim. *See In re Young*, 927 F.2d 588, 590, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991). *See also* 37 C.F.R. § 41.37(c)(1)(vii).

FINDINGS OF FACT

Appellants invented a method of indicating a delay to a subscriber seeking to gain network access (Specification 4: 7-8).

The method calls for transmitting at least one message comprising existing delay information corresponding with an estimated delay length associated with accessing the (network) service through an open loop network (Specification 9: 3-4, 17-23; Fig. 3).

The estimated delay length may comprise at least one time interval between a first instant corresponding with a received autonomous service request generated at a predefined moment in time and a second instant corresponding with granting service access (Specification 7: 16-18).

The predefined moment in time comprises at least one of a periodic and an aperiodic instant (Specification 7: 18-19).

Ament describes a system and method for controlling the service engagement in a data bus system that transmits at least one message comprising existing delay information corresponding with a delay length associated with accessing the (network) service (para. [0043]).

Ament teaches a delay length comprising a time interval between a first instant corresponding with a received service request and a second instant corresponding with granting service access (para. [0043]).

Bender teaches a method and apparatus for rapid assignment of a traffic channel in digital cellular communication systems, including accessing a service through an open loop network (col. 1, ll. 42-44; col. 2, ll. 59-61; col. 4, ll. 24-28).

Buford teaches an autonomous service request generated at a predefined moment in time, the predefined moment in time comprising a “periodic instant” (col. 17, ll. 63-65). Buford teaches sending successive requests with a “given time” between each one (col. 17, l. 65).

PRINCIPLES OF LAW

In rejecting claims under 35 U.S.C. § 103, the Examiner bears the initial burden of establishing a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992). *See also In re Piasecki*, 745 F.2d 1468, 1472, 223 USPQ 785, 788 (Fed. Cir. 1984). The Examiner can satisfy this burden by showing that some objective teaching in the prior art or knowledge generally available to one of ordinary skill in the art suggests the claimed subject matter. *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). Only if this initial burden is met does the burden of coming forward with evidence or argument shift to the Appellants. *Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444. *See also Piasecki*, 745 F.2d at 1472, 223 USPQ at 788. Thus, the Examiner must not only assure that the requisite findings are made, based on evidence of record, but must also explain the reasoning by which the findings are deemed to support the Examiner’s conclusion.

Our reviewing court states that “claims must be interpreted as broadly as their terms reasonably allow.” *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989). Our reviewing court further states that “the words of a claim ‘are generally given their ordinary and customary meaning.’” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312, 75 USPQ2d 1321, 1326 (Fed. Cir. 2005) (en banc)(internal citations omitted). The “ordinary

and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Id.* at 1313, 75 USPQ2d at 1326. The description in the specification can limit the apparent breadth of a claim in two instances: (1) where the specification reveals a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess; and (2), where the specification reveals an intentional disclaimer, or disavowal, of claim scope by the inventor. *Id.* at 1316, 75 USPQ2d at 1329.

References within the statutory terms of 35 U.S.C. § 102 qualify as prior art for an obviousness determination only when analogous to the claimed invention. *In re Clay*, 966 F.2d 656, 658, 23 USPQ2d 1058, 1060 (Fed. Cir. 1992). Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved. *In re Deminski*, 796 F.2d 436, 442, 230 USPQ 313, 315 (Fed. Cir. 1986); *see also In re Wood*, 599 F.2d 1032, 1036, 202 USPQ 171, 174 (CCPA 1979) and *In re Bigio*, 381 F.3d 1320, 72 USPQ2d 1209, 1212 (Fed. Cir. 2004).

ANALYSIS

The Examiner correctly shows where all the elements of claim 1 appear in the Ament and Bender prior art references. Ament does not explicitly characterize the “waiting time” for a service (para. [0043]) as an

estimate. It is noted, however, that Appellants' Specification also fails to explicitly disclose the concept of an "estimated" delay length², but rather discusses delay as a "value to be expected by a subscriber" (Specification 9: 19-20)(emphasis added) and that such expected delay "might be modeled using a delay distribution algorithm" (Specification 9: 21-22). The Specification does not provide any special definition for the term "estimated." The Examiner explains that "the time to accomplish a communication service can vary based on the communication conditions, which can alter the throughput i.e. the more interference, the less the throughput and therefore, the waiting time is an estimate." (Answer 6: 3-6). We agree with the Examiner that the variability of communication conditions means that any delay length figure computed based on prior or current communications is necessarily only an estimate of the delay length to be expected prospectively. As a result, we agree with the Examiner that Ament teaches transmitting a message containing "estimated" delay information, as the term is commonly understood.

As conceded by the Examiner, Ament does not teach accessing a service through an open loop network. Bender so teaches (col. 1, ll. 42-44; col. 2, ll. 59-61; col. 4, ll. 24-28), and suggests that doing so enables the rapid assignment of traffic channels (col. 4, l. 15).

Appellants assert that "the disclosures of the Ament and Bender references are considerably different" (Br. 13: 13) and that they "were not intended to be modified or combined, in a manner, as suggested by the

² The word "estimated" does not appear in the text of the Specification. It only appears in Figure 3 as the subscript of the term " D_{estimate} ." It is further noted that the details of Figure 3 are not explained in the Specification.

Examiner” (Br. 13: 14-15). Taking these assertions as an argument that Ament and Bender constitute nonanalogous prior art, we find the argument unpersuasive. Ament is directed to controlling service engagements for data bus users, in order to control a large number of services and large volumes of data (para. [0003]); Bender is directed to rapidly assigning traffic channels to a plurality of mobile stations in a wide area high-speed packet data cellular communication system (Abstract, lines 1-3). Appellants’ invention is directed to wireless (“cellular”) data communication, and Appellants recognize that access delays for such communication are undesirable (Specification 3: 24-29). It is clear that (at minimum) both Ament and Bender are reasonably pertinent to the problem with which Appellants are involved, i.e. the transmission of large amounts of data at high rates and in a highly efficient manner, without undue delay.

With regard to claims 3 and 12, the Examiner concedes that Ament does not teach a delay length comprising a time interval between a first instant corresponding with a received autonomous service request generated at a predefined moment in time, and a second instant corresponding with granting service access. Buford teaches sending access requests, with a given time between attempts (col. 17, ll. 64-65), and suggests that doing so helps measure the signal from a subscriber unit (col. 18, ll. 3-5) and improve the location estimate of a subscriber unit (col. 17, ll. 45-47). The access requests of Buford are generated at a “predefined” moment in time, within the common meaning of the term “predefined,” in that the phrase “given time between attempts” means that the time of the succeeding attempt is “predefined” once the preceding attempt has occurred. Appellants’ argument

that “predefined moment in time” must refer to a “certain defined instant of absolute time rather than a relative time” (Br. 15: 1-2) is not supported by the specification, which does not specify either absolute or relative time (Specification 7: 16-18).

With regard to claims 4 and 13, Buford teaches that the predefined moment in time comprises a “periodic instant” (col. 17, l. 65). Appellants argue that Buford is silent with regard to periodic and/or aperiodic instants of time (Br. 15: 17). Appellants’ Specification, however, offers no special definition of “periodic instant” or “aperiodic instant.” As noted above, Buford teaches sending access requests with a given time between attempts. We understand “given time” to mean that the same amount of time passes between each successive attempt, i.e. that requests occur at a periodic interval.

Appellants further allege that Buford teaches away from the Examiner’s proposed modification of the prior art, in that Buford “appears to teach away from defined instants of time” (Br. 15: 22-23)(emphasis original). In the absence of any special definition of the term “instant,” or any further explanation of the reasons Buford is alleged to teach away from the proposed modification, we are unpersuaded by Appellants’ statement.

CONCLUSION OF LAW

Based on the findings of facts and analysis above, we conclude that the Examiner did not err in rejecting claims 1-17. The rejection of those claims is affirmed.

DECISION

The Examiner's rejection of claims 1-17 is Affirmed.

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AFFIRMED

ELD

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